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No. 94-1742

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

JENNINGS AND MITZI OSBORNE,

Petitioner,

v.

ARLETA POWER, *ET AL.*,

Respondents.

Petition For Writ Of Certiorari
To The Supreme Court Of Arkansas

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, neighbors of Petitioner Jennings Osborne and prevailing parties in the court below, respectfully request that this Court deny the Petition for Writ of Certiorari submitted on behalf of Petitioners Jennings and Mitzi Osborne.

RESTATEMENT OF THE CASE

In 1986 Petitioner Jennings Osborne began an annual practice of constructing and operating a massive Christmas light display on and about his residential property in the Robinwood subdivision of the City of Little Rock. (A.149-150) The Osborne family considers the Christmas lights a gift to their daughter, Breezy, who asked for some Christmas lights when she was five years old. (A.142) The Jennings Osborne Christmas light display has been expanded and enlarged each year of its operation. By the 1992 Christmas season, the display contained 1.6 to 1.7 *million* lights. (A.139) Prior to the 1993 Christmas season Jennings Osborne purchased the two homes located on either side of his original property and extended the gigantic display to all three properties. The 1993 Jennings Osborne light display contained nearly 3.2 *million* lights. (Appendix K to Petition, p. 34a)

Jennings Osborne testified that his construction and operation of the light display was a completely voluntary undertaking and that he was under no form of compulsion to do it. (A.142) He further testified that he was a Baptist, although he had lived in Little Rock since 1965 and had not belonged to or attended a Baptist church during that time. (*Id.*) Jennings Osborne testified that Baptist doctrines do not require him to operate a Christmas light display. (*Id.*) He conceded that operating the display or failing to operate the display would not affect his salvation or his spiritual standing. (*Id.*) He also testified that Roman Catholicism, his wife's religion, did not require the operation of a Christmas light display, and that none of the content of the display was required by religious beliefs. (*Id.*)

After Jennings Osborne purchased the two additional properties and announced his intention to expand his display to those properties, the Respondents filed suit in the Chancery Court of Pulaski County, Arkansas, seeking an injunction to abate a public and private nuisance, and to enforce the restrictive covenants imposed on the Osborne properties. The Osbornes contended that no restriction could be placed on the display because of the requirements of the Free Exercise Clause of the First Amendment and the provisions of the Religious Freedom Restoration Act of 1993 (RFRA), (codified at 42 U.S.C. § 2000bb (Supp. V. 1994)).

Up until 1993, substantial portions of the Osborne Christmas light display had a secular, non-religious theme. A lighted train atop a wall was pulled by a steam engine driven by Mickey Mouse. Silhouettes of toy soldiers and other similar secular objects were abundant. A revolving carousel of horses was utilized, as well as sleighs, reindeer, and tens of thousands of strands of lights. (A. 140-141) While the lawsuit was pending in the trial court, the 1993 Osborne light display underwent a religious transformation. A figure of St. Nicholas replaced Mickey Mouse as the driver of the train. (*Id.*) One of the cars in the train was inscribed with a portion of a verse of scripture. (*Id.*) A huge "nativity display" and a "church and choir display" were added, along with a host of heralding angels. (*Id.*) Even the horses on the revolving carousel were replaced by figures of angels and the giant globe which revolved high above the estate was adorned with a portion of a biblical verse. (*Id.*)

After an extensive trial, the trial judge found that the operation of the Osborne Christmas light display in the

Osbornes' exclusively residential neighborhood constituted both a public and a private nuisance. (Appendix F to Petition, pp. 24a-25a) The court further held that the construction and operation of the display violated express provisions of restrictive covenants on the Osbornes' residential property. (*Id.*) The trial court ruled that the remedy of abatement of the nuisance did not offend the Free Exercise Clause or RFRA "because it does not substantially burden the free exercise of religion under the evidence presented at the trial." (*Id.* at pp. 25a-26a) The trial court found, from the evidence, that the construction and maintenance of a Christmas light display was not a required tenet of the Osbornes' religious beliefs or practice. (*Id.*) This ruling was affirmed by the Arkansas Supreme Court, on *de novo* review.

In ruling on the "religious exercise" issues, the Arkansas Supreme Court also focused on the testimony of the Osbornes concerning their religious beliefs concerning celebration of the Christmas season by a massive display of electric lights. Contrary to Petitioners' assertion in their Petition (p. 8) the court did not hold that RFRA does not protect a religious exercise unless it is mandatory. Neither did it hold that nuisances are excluded from RFRA's coverage, as contended by the Petitioners. What the Arkansas Supreme Court actually ruled was that, in light of the Osbornes' admissions, placing limitations on their light display did not constitute a substantial burden on the free exercise of religion. *Osborne I,* 318 Ark. at 863-64, 890 S.W.2d at 572-73.

In its opinion of December 5, 1994, the Arkansas Supreme Court enjoined the Osbornes from placing massive Christmas light displays on and about their home that are

calculated to and do attract an unusually large number of visitors to the neighborhood. *Osborne I*, 318 Ark. at 866, 890 S.W.2d at 574. The Osbornes were directed to reduce substantially the size and extravagance of the display at and about their home to a level which will not attract the large crowds that have been drawn to the neighborhood in the past. (*Id.*) The court emphasized that this injunction only applied to the Osbornes' residence and that they were free to maintain a massive display in an unrestricted manner at a location where it would not constitute a nuisance and violate restrictive covenants. (*Id.*) Although the court entered an immediate experimental injunction on December 5, it expressly recognized that further refinement of the restrictions it imposed might be warranted. (*Id.*) It remanded the case to the chancery court for enforcement of the injunction and such further proceedings as might be necessary. The court concluded that it was not the appropriate medium to craft the exact restrictions or to monitor the results of such restrictions. (*Id.*) The injunction it entered was focused specifically on the harm created by the Osborne light display and directed that the display be reduced substantially to a level at which the nuisance would be abated.

SUMMARY OF THE ARGUMENT

I. This case presents no issue appropriate for the Court's exercise of discretionary review. The Petitioners' claim that the decision below conflicts with several United States district court decisions is disingenuous. Petitioners' arguments are based on a tortured construction of the decision below, combined with a mangling of other case precedent, and the RFRA.

II. The decision of the Arkansas Supreme Court is not erroneous. That court properly adhered to controlling precedent. The ruling challenged here was based on uncontroverted admissions by the Petitioners. Restriction of the Osbornes' massive Christmas light display does not substantially burden the free exercise of religion under the RFRA or the controlling precedents of this Court.

REASONS FOR DENYING THE WRIT

The petition fails to satisfy criteria traditionally applied by this Court in determining whether to grant a Writ of Certiorari. Petitioners do not even allege any circumstance identified in Rule 10 as a potential basis for granting discretionary review. The stated basis of the Petition -- that the decision below conflicts with several United States district court decisions construing RFRA -- is premised on an erroneous construction of the decision below, as well as a faulty analysis of controlling precedent and the RFRA.

The Arkansas Supreme Court decided this case by properly applying the applicable principles of law to uncontroverted evidence in the record. The decision diligently conforms with both the letter and the spirit of the law applicable to the free exercise of religion. There is no valid basis for asserting error in the decision below. Furthermore, the facts of this case are sufficiently unique that its precedential value is likely to be minimal.

I. The Arkansas Supreme Court's Decision Does Not Conflict With Other Decisions Concerning The Application Of RFRA.

Petitioners attempt to provoke a discretionary review

of this case by claiming that the decision of the Arkansas Supreme Court is squarely in conflict with six United States district decisions. Such a conflict, if it existed, is not one of the criteria listed in Rule 10. Rule 10.1.(b) refers to a conflict between decisions of a state court of last resort and another state court of last resort or of the United States court of appeals. No such conflict is even alleged in this case. Moreover, the decision below is not "squarely in conflict" with any of the decisions cited by the Osbornes in their petition.

The Petitioners strive to construct a conflict by drawing tortured conclusions concerning the actual holding of the Arkansas Supreme Court. Petitioners state that the decision below contains a holding that RFRA contains a "nuisance exception." The term "nuisance exception" is a novel invention. Neither that term nor any such concept appears in the decision below.

Petitioners' claim that the Arkansas Supreme Court *held* that nuisances are excluded from RFRA's coverage is simply not true. Rather, the Arkansas Supreme Court addressed the Petitioners' argument that RFRA prohibited any governmental regulation of the display, even if the operation of the display constituted a nuisance. The court cited *Western Presbyterian Church v. Board of Zoning Adjustment*, 862 F.Supp. 538 (D.D.C. 1994), as an example of judicial recognition that RFRA, of itself, would not completely bar restrictions on activities that are nuisances. *Osborne I*, 318 Ark. at 864, 890 S.W.2d at 573.

At every stage of this proceeding, Petitioners have invoked RFRA as a talisman which they claim prohibits absolutely any governmental interference with any conduct

that has any religious motivation. The Arkansas Supreme Court responded to this contention by noting that the mere incantation of RFRA did not produce such an extreme result. The court simply noted, as did the district court in *Western Presbyterian Church*, that RFRA does not automatically precluded governmental action in all circumstances. The balance of the opinion below demonstrates that the Arkansas Supreme Court properly adhered to the applicable principles of law on this subject.

The principal flaw in Petitioners' analysis is the failure to recognize the cardinal significance of the threshold requirement of a "substantial burden" on religious exercise. That term is repeatedly utilized in the RFRA to denote the degree of interference with religious exercise which is required to trigger the compelling interest test set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

Throughout their petition, the Osbornes state that any restriction on the Osborne Christmas light display constitutes a "substantial burden" on religious exercise. This declaration assumes, of course, the very fact which is not in evidence in this case.

The RFRA is a congressional declaration that the compelling interest test set forth in *Sherbert* and *Yoder* should be utilized in all cases where the free exercise of religion *is* substantially burdened by government action. The RFRA does not purport to change the test for *when* governmental action "substantially burdens" religious exercise. It merely provides that the compelling interest test be utilized when a court determines that a substantial burden exists.

In order to find a "substantial burden" on the free exercise of religion this Court has uniformly required that there be an irreconcilable conflict between the requirements of the law and a tenet of deeply-rooted religious belief. The state laws in *Sherbert* and *Yoder* placed a substantial burden on the free exercise of religion because they required a choice between compliance with the law or compliance with religious conscience. If the parties in those cases performed according to the *requirements* of their sincere faith, they would violate the criminal law (*Yoder*) or be forced to forego otherwise available benefits (*Sherbert*).

Likewise, in *Thomas v. Review Board of Indiana Employment Security Div.*, 450 U.S. 707 (1981), the Court found that the employee had been "put to a choice between fidelity to religious belief or cessation of work." 450 U.S. at 717. In *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987), the Court again emphasized the abject conflict produced when a party is forced to choose between following the precepts of his or her religion and forfeiting benefits, on the one hand, or abandoning one of the precepts of his or her religion in order to obtain the benefits, on the other hand.

All of the cases cited above make it clear that there are many laws which may incidentally affect religious exercise but which do not substantially burden religious exercise. The *sine qua non* of a finding of "substantial burden" is the irreconcilable conflict between obedience to government and obedience to religious conscience. In this case, however, the construction, operation and maintenance of a massive Christmas light display is no part of any required tenet of the Osbornes' religious belief.

The evidence in this case established that the operation of a massive electric light display was only one potential means the Osbornes could use for celebrating and proclaiming their faith. It is a completely voluntary activity, not compelled by their religious beliefs. The Osbornes never claimed that any religious belief they held required the erection or maintenance or operation of a Christmas light display. They never claimed a religious requirement with regard to the content or makeup of the display. They never claimed that religious conviction required the operation of such a massive display in the exclusively residential neighborhood where they live. They merely claimed that one of the reasons they operated the display was religiously motivated. They did not claim that religious motivation was the sole reason for creating such a giant attraction.

The Arkansas Supreme Court never stated or implied that the RFRA does not apply to nuisances. The court never concluded, as alleged, that nuisance-creating activity lies completely outside the purview of RFRA. There is no conflict between the Osborne decision and federal cases construing the RFRA.

The Petitioners' claim that the Arkansas Supreme Court created a "two-tiered standard of review" for nuisances under RFRA is made up of the whole cloth. The same is true of the allegation that the Arkansas Supreme Court held that injunctions abating religious "nuisances" merely have to "pass muster under a weak common-law reasonableness standard." (Pet., at p. 12) The Arkansas Supreme Court merely found from the uncontroverted evidence that there was no conflict between the abatement remedy and adherence to a tenet of deeply-rooted religious

belief. There is nothing about the opinion below which places it in conflict, squarely or otherwise, with any controlling precedent on this subject. There is no basis for requesting discretionary review to resolve a judicial conflict. No conflict exists.

II. The Decision Of The Arkansas Supreme Court Is Eminently Correct.

A. The Arkansas Supreme Court Properly Found That Abatement Of The Osborne Nuisance Did Not Constitute A Substantial Burden On The Exercise Of Religion.

Petitioners' argument that the Arkansas Supreme Court erred by placing restrictions on the Osborne Christmas light display suffers from the same glaring flaw identified in the previous section. The Osbornes claim, without any evidentiary basis, that limitations placed on the display constitute a substantial burden on the free exercise of religion. They state that the analysis applied in *Sherbert*, *Yoder*, and their progeny, has nothing to do with whether an activity is mandated or proscribed by religious faith. This assertion completely ignores the essential finding this Court required in each of these cases.

Under the analysis applied in *Sherbert*, *Yoder*, *Thomas*, and *Hobbie*, this Court consistently emphasized the type of conflict which must exist between government action and religious practice. In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court stated:

> The trial testimony showed that respondents believed, in accordance with the tenets of Old

> Order Amish communities generally, that their children's attendance at high school, public or private, was contrary to the Amish religion and way of life. They believe that by sending their children to high school, they would not only expose themselves to the danger of the censure of the church community, but, as found by the county court, also endanger their own salvation and that of their children.

406 U.S. at 209.

> The impact of the compulsory-attendance law on respondents' practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law *affirmatively compels them*, under threat of criminal sanction, to perform acts *undeniably at odds with fundamental tenets* of their religious beliefs.

Id. at 218. (emphasis supplied)

This Court concluded that secondary schooling contravened the basic religious tenets and practice of the Amish faith, both as to the parent and the child. The Court recognized that the respondents in that case were forced to choose between abandoning fundamental religious beliefs or subjecting themselves to punishment under the criminal law.

The same type of conflict between deeply-held religious tenets and governmental action was emphasized

in *Sherbert v. Verner*, 374 U.S. 398 (1963). In that case, this Court held that the States disqualification of Sherbert

> force[d] her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against [her] for her Saturday worship. 374 U.S. at 404.

Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 140 (1987).

The very same principle is emphasized in *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707 (1981). There, the Court stated:

> Where the state conditions receipt of an important benefit upon conduct *proscribed* by a religious faith, or where it denies such a benefit because of conduct *mandated* by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to *violate* his beliefs, a burden upon religion exists.

450 U.S. at 717-718 (emphasis added). The language above was affirmed by verbatim quotation in *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. at 141. The repeated use of the terms "proscribed," "mandated," and

"violate" in all of these cases makes it abundantly clear that the challenged government action must actually conflict with activity which is required by sincere religious practice. As this Court noted in *Wisconsin v. Yoder*:

> It is true that activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers.

406 U.S. at 220.

There is nothing about the RFRA which changes this fundamental principle of law. In fact, as noted earlier, the RFRA repeatedly utilizes the same terminology, "substantial burden," which this Court has required in order to trigger protection of religious activity. That conflict is conspicuously lacking in this case. By the Osbornes' own admission, their religious beliefs do not require them to celebrate Christmas with a massive display of electrical lights. Nor do their religious beliefs require them to operate such a massive display of electric lights at their residential location.

The decision of the Arkansas Supreme Court added no requirement to those prescribed by Congress in RFRA. The decision is consistent with the controlling precedent handed down by this Court. There is no basis for issuing the Writ in this case.

B. The Compelling Interest Test Of RFRA Is Inapplicable Where There Is No Substantial Burden On The Exercise Of Religion.

As discussed in the previous section, there is no substantial burden on the exercise of religion in this case. The Arkansas Supreme Court was not required to apply a compelling-interest/least-restrictive-means analysis under the controlling precedents of this Court. The Arkansas court did, however, utilize a comparable standard in restricting the operation of the Osborne light display. In deference to the Osbornes' qualified rights of free speech and free exercise the Arkansas Supreme Court issued an injunction which would allow the Osbornes the maximum expression possible without creating and maintaining a public and private nuisance.

Petitioners do not challenge the Arkansas Supreme Court's finding that the operation of the massive Christmas light display constituted a public and private nuisance, or that it violated express provisions of restrictive covenants on their property. They claim, however, that the incantation of "religious motivation" results in an absolute prohibition of any form of governmental regulation. Even though the compelling interest test is not required under the evidence in this case, the Arkansas Supreme Court injunction wisely focused on the specific nuisance conditions caused by the display and restricted the operation of the display only to the extent that it produced the nuisance conditions. There is no error in that ruling. Certainly there is no basis for discretionary review of that decision by this Court.

C. The Experimental Injunction Issued By The Court Below Properly Protects Any Constitutional Rights Of The Petitioners.

The Osbornes have continually complained that the injunction issued on December 5, 1994 is unconstitutionally vague and overly-broad. They argue that it violates the RFRA because it is not the least restrictive means available. As previous shown, the RFRA is not applicable because there is no substantial burden on religious exercise. In any event, the injunction is an entirely appropriate remedy under the circumstances of this case.

This case was decided on December 5, 1994, as the Osbornes were engaged in the construction of their massive Christmas light display for 1994. The court found that the display constituted a public and private nuisance and that abatement of that nuisance was necessary and proper. The court also found that an injunction to enforce the restrictive covenants on the Osbornes' land was necessary and proper. The court acknowledged that it was not the appropriate medium to craft precise restrictions for all future activity. It also recognized it was not the appropriate medium to monitor the results of such restrictions. *Osborne I*, 318 Ark. at 866. Accordingly, the court remanded the case to the trial court for such further proceedings as might be necessary. The experimental injunction was issued in order to prevent imminent irreparable harm to the Respondents and to the public, and to provide guidance to the trial court upon remand.

The injunction issued under these exigent circumstances was not "baffling," as the Osbornes claim, but was clear, concise, and unambiguous. In its *per curiam* order

of December 16, 1994, the court rejected the Osbornes' suggestion that the injunction was extremely broad and vaguely worded. The court stated that its directives were clear and unambiguous:

> While we believe the immediate injunction is short, concise and readily understandable, the parties may present any good faith inquires to the chancellor to whom this case has been remanded for enforcement.

Osborne II, 319 Ark. at 53, 890 S.W.2d at 575. There is no valid claim of constitutional error in the careful handling of this case by the Arkansas Supreme Court. There is no basis for seeking extraordinary review of its decision by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

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